

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)	No. CR18-315RAJ
)	
Plaintiff,)	
)	REPLY TO GOVERNMENT'S
v.)	RESPONSE TO MOTION TO UNSEAL
)	DKT. 314 (<i>FRANKS</i> ORDER) AND
GIZACHEW WONDIE,)	DKT. 321 (PROBABLE CAUSE
)	ORDER)
Defendant.)	
)	
)	
)	

Mr. Wondie, through counsel, moved to unseal two orders, Dkts. 314 (filed under seal) and 321 (filed under seal). The government acknowledges the applicable standard is that the public (which includes Mr. Wondie, his family, members of the bar, law students, and anyone else who would seek to review the Court's order) have a "common-law" right "to inspect and copy public records and documents." Dkt. 327, p. 2. The government acknowledges that under the First Amendment there is a strong presumption in favor of disclosure, a presumption that cannot be overcome unless there are "findings that closure is essential to preserve higher values and [the restriction] is narrowly tailored to serve that interest." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); see also Dkt. 327, p. 2.

The government, itself, has publicized almost all of the facts and information that they are now requesting be redacted from the Court's Orders. As a result, the claim that unsealing the unredacted Orders would cause harm to an investigation is untenable.

1 Because the government has not overcome the strong presumption in favor of unsealing
2 the orders, the Court should unseal both orders in their entirety.

3 Mr. Wondie respectfully opposes any redactions to these orders outside of the
4 acronyms agreed upon for the purposes of the public evidentiary hearings conducted on
5 June 21 and June 22, 2021. Dkt. 303. The government repeatedly accused Mr. Wondie
6 of being involved in a homicide in open court. The government repeatedly disclosed the
7 very information it seeks to redact in these orders when levying those accusations.
8 Neither the government nor any King County agencies requested that these facts and
9 details be redacted or kept out of the public record when used against Mr. Wondie. And
none of these parties has provided any reason to do so now.

10 **I. The Defense Disputes that it is Unwilling to Accommodate the King**
11 **County Agencies' Privacy Concerns and the Record Shows**
Otherwise

12 The King County Sheriff's office and the King County Prosecutor's office have
13 filed declarations asking that both orders remain sealed in their entirety, or in the
14 alternative, unsealed only as suggested by the redacted versions the government
15 provided as exhibits to its filing. The government joins the alternative request. Without
16 venturing into the details of the assertions in the declarations, the declarations contain
17 inaccuracies.

18 Throughout this case, which went on for more than two years, defense counsel
19 has agreed to numerous protective orders to secure the secrecy of the ongoing
20 investigation cited to by the government and the King County agencies. *See* Dkts. 281,
21 184, 150, 3. The defense does not seek to have the pleadings or motions that contained
22 reference to the protected discovery and documents in this case be unsealed, because
23 many of the details and facts surrounding the investigation are contained within those
documents. However, the Court's Orders do not contain such protected details or facts.

24 Throughout the two years this case was litigated, the government represented to
25 defense counsel that the protective orders, the unique discovery process, and the
26 breadth of the protected information was necessary to protect the ongoing King County

1 investigation. Presumably, this representation was made with the knowledge of the
2 King County agencies who were asserting the need for such privacy.

3 On December 21, 2020, defense counsel encouraged the government to keep the
4 King County agencies apprised of the facts and circumstances of this case so that they
5 had an opportunity to be heard on issues relating to the sensitivity, sealing and privacy
6 interests involved in this case. *See* Dkt. 182-2 (E-mail) (“Please make sure to provide a
7 copy to Mr. O’Toole and Detective Free. I will ask that the judge to give them the
8 opportunity to be heard since they seem to be the driving force over the sensitivity of
9 these items.”). This email predated the public evidentiary hearings that were held on the
10 same issues addressed in the Court’s Orders.

11 As requested by the government, and with no opposition from the defense, the
12 Court’s Orders were made available to the county on July 7, 2021 including Ms. Decker
13 who is no longer employed by the county.

14 **II. The Facts Sought to be Redacted are a Matter of Public Record,**
15 **Having Been Made Public on Multiple Occasions by the Government.**

16 In *United States v. Index Newspapers LLC*, 766 F.3d 1072 (9th Cir. 2014), the
17 Court held “there is no substantial probability that disclosing the order holding Duran in
18 contempt will jeopardize grand jury secrecy, and that redacting the remaining
19 documents will adequately protect the government's compelling interest in maintaining
20 the secrecy of the grand jury.” *Id.* at 1085. In reaching this conclusion the Ninth Circuit
21 did not “consider whether there is a separate common law right of access to [grand jury]
22 documents because any such presumption in favor of access is outweighed by the
23 compelling government interest in maintaining grand jury secrecy.” *Id.*

24 Here there is no substantial probability that disclosing the orders in their entirety
25 will hinder “the integrity of an open state homicide investigation,” Dkt. 327, p. 1,
26 because almost all the facts that the government and the King County agencies seek to
redact have been made a matter of public record *by the government*. Additionally,
because judicial orders, unlike grand jury proceedings, are not traditionally kept secret,
both the common law right to access and the First Amendment support disclosing both

orders in their entirety. The government's response does not attempt to meet either burden or test. *Index Newspapers LLC* at 1084-85 (describing both the First Amendment and the common law burden or test).

If the Court looks at the exact terms the government wants to redact and compares them with the government's own representations throughout this case, the Court will see that the terms were used by the government in publicly filed documents and in public proceedings.

On December 7, 2018, the government made the following representations as to the homicide:

B. King County Sheriff's Office (KCSO) Investigation

11. On or about November 20, 2018, HSI special agents learned that WONDIE was being separately investigated by KCSO for a homicide. KCSO believed WONDIE was in possession of the murder weapon, which was a firearm registered to him.

12. Based upon the initial investigation of WONDIE, officers believed that WONDIE was residing at an apartment in the Capitol Hill neighborhood of Seattle near Central College (hereinafter, the Capitol Hill apartment) and driving the Audi. KCSO detectives obtained state search warrants for the Capitol Hill apartment and the Audi to search for evidence of the murder.

13. On or about December 6, 2018, HSI special agents participated in a joint operation with KCSO as they were intending to execute the search warrants.

Dkt. 1 (Complaint), p. 6.

On December 11, 2018, in front of Mr. Wondie's family and friends, the government made the following representations: "[A]s alleged in the complaint, the defendant was linked to an ongoing King County homicide investigation, and in connection with that investigation, on December 6th, HSI and the King County Sheriff's Office executed a search warrant on the defendant's vehicle, during which they found on the defendant's person distribution quantities of prescription pills and cocaine." Dkt. 37-1 (Bond Hearing Transcript) p. 6. The government continued:

1 9 I would just draw to the Court's attention with respect to
 2 10 the use of a weapon charge from 2017, in April of 2017, this
 3 11 defendant was stopped in connection with a report of a
 4 12 brandishing of a firearm. He was stopped in his vehicle.
 5 13 At that time, law enforcement found and seized a firearm.
 6 14 It was a .40 Smith and Wesson. That gun was later
 7 15 test-fired by law enforcement and entered in the NIBIN
 8 16 system. The gun was then subsequently returned to the
 9 17 defendant. But after that time, after the gun was returned
 10 18 to the defendant, it was used in a homicide. The defendant
 11 19 claims now -- he's told law enforcement in his post-arrest
 12 20 interview that it was stolen from him. But, certainly, the
 13 21 conduct is very serious in this case.

13 *Id.*, p. 8.

14 On December 26, 2018, in response to Mr. Wondie's request to modify his bond
 15 conditions, the government alleged as to the homicide, "In November 2018, HSI special
 16 agents learned that the King County Sheriff's Office ("KCSO") was also investigating
 17 the defendant in connection with a homicide....Specifically, KCSO detectives believed
 18 the defendant had possessed a weapon—a firearm registered to him—used in a
 19 murder...He also admitted that he had possessed the suspected murder weapon at one
 20 point in time, though he claimed the firearm was stolen from him and denied
 21 knowledge of the murder." Dkt. 18 (Government Opposition), p. 2.

22 The government argued as to these facts that "[t]he defendant has possessed a
 23 firearm used in a homicide under investigation by the King County Sheriff's Office.
 24 The defendant's connection to this weapon is simply further cause for concern
 25 regarding the serious danger the defendant poses to the community." *Id.*, p. 5. The
 26 Honorable James P. Donohue denied the request for modification, in part because "the

1 defendant had been associated with a firearm that was allegedly stolen from him, and
2 used in a subsequent homicide.” Dkt. 20 (Order), p. 1-2.

3 On April 9, 2019, a second bond hearing was held where Mr. Wondie again
4 requested to modify his bond conditions. Dkt. 37-2 (Second Bond Hearing Transcript).
5 At that hearing, the government stated: “Just by way of background, as the Court may
6 already be aware, last fall this defendant was the target of an HSI drug investigation. He
7 was simultaneously being investigated by the King County Sheriff’s Office in
8 connection with a weapon that the defendant had at one point possessed, which was
9 used in a murder.” *Id.*, p. 11.

10 On November 12, 2019, in response to Mr. Wondie’s third request to modify his
11 bond conditions, the government alleged as to the homicide: “In November 2018, HSI
12 special agents learned that the King County Sheriff’s Office (‘KCSO’) was also
13 investigating the defendant in connection with a homicide. Specifically, KCSO
14 detectives believed the defendant had possessed a weapon—a firearm registered to
15 him—used in a murder.” Dkt. 36, (Government Opposition), p. 2.

16 The government argued, “And the defendant also possessed a firearm that
17 KCSO, relying upon a NIBIN lead, believe was used in a 2018 homicide...Even
18 assuming the defendant had no knowledge of or involvement [in the homicide], these
19 facts evidence extreme recklessness on the defendant’s part with regard to the weapons
20 that come through his hands.” *Id.*, p. 6. The NIBIN lead referenced three events. Dkt.
21 37-4 (NIBIN Lead). The first event was April 7, 2017, when the firearm was seized and
22 described as a .40 caliber Smith and Wesson, Serial Number MRN7255, test fired, and
23 returned to Mr. Wondie. *Id.* The second event was May 28, 2018, where there was
24 property damage with evidence described as “40 S&W.” *Id.* The third event, dated
25 September 19, 2018, is described as “HOMICIDE/MURDER,” and the exhibit is “10.”
26 *Id.* The case number for the homicide/murder is also described. *Id.* The lead was
generated by Seattle Police officer Kevin Jones and Bureau of Alcohol, Tobacco, and
Firearm analyst Sam Gonzales. *Id.* At the hearing on the motion, the government
opposed modification, arguing:

1 The three-step process that was just laid out here in the report cited by the
 2 defendant is exactly what happened in this case with respect to not one
 3 but two firearms associated with the defendant. First, the NIBIN network
 4 software generated a list of potential matches described in this report cited
 5 by the defendant as having a very high level of accuracy between the shell
 6 casings from the firearm used to kill an individual named Amarah Riley
 7 in Seattle in September 2018 to the shell casings from a firearm
 8 discharged at a nonfatal shooting earlier, again in Seattle, in May 2018, to
 9 the shell casings from a firearm seized from the defendant in Seattle, test-
 10 fired and then returned to the defendant in Seattle in July 2017. Two
 11 trained specialists then examined these digital image correlations and
 12 after that review provided the NIBIN leads to law enforcement. So, again,
 13 Your Honor, a first specialist reviewed the matches that were provided by
 14 the computer system, and then that specialist's work was reviewed by a
 15 peer before the NIBIN lead was generated. So that's the 40 Smith and
 16 Wesson in this case that has not yet been recovered but that is associated
 17 with the defendant...

18 ...This case -- because the firearm, the 40 Smith and Wesson firearm, was
 19 seized from the defendant in July 2017 after a complaint was called in
 20 regarding an individual who had brandished a firearm in Capitol Hill.
 21 Seattle Police Department responded. They found the defendant with the
 22 firearm. They took the firearm from him at that time. After they took the
 23 firearm in July 2017, they test-fired it and they entered the results into
 24 NIBIN. No charges were pursued in that case so the firearm was returned
 25 to the defendant, again, around that time...

26 ...It's linked to two shootings. There are NIBIN connections linking it to
 the -- a murder in September of 2018 in Seattle and also to a firearm that
 was discharged at a nonfatal shooting in Seattle in May 2018. That's the
 40 Smith and Wesson.

Dkt. 40, p. 12-13.¹

On January 7, 2020, in a response to a motion to suppress, the
 government stated:

While the firearm was in the custody of the Seattle Police Department, it
 was test-fired, then returned to the defendant on or about July 18, 2017.

¹ The reports and the corresponding NIBIN lead were filed on the public docket in
 connection with a motion to suppress evidence and the government never moved to
 have those documents sealed. Dkt. 49, 49-1 through 49-4.

1 The shell casing from the test-fire was retained, however, and it was later
2 analyzed by the Integrated Ballistic Information System (IBIS), a piece of
3 equipment that takes high-definition photographs of the unique markings
4 on a fired casing. That data was then submitted to the National Integrated
5 Ballistic Information System, a database of shell casings obtained from
6 crime scenes and test-fires. Many months later, shell casings from a
7 homicide and a completely separate shots-fired incident in Seattle were
8 recovered and also entered into NIBIN. The casings from those two
9 incidents were matched to the casing from the test-fire of the defendant's
10 gun. That match formed the basis of an application for a search warrant
11 for the defendant, his car, and his apartments, which ultimately resulted in
12 recovery of the evidence for which the defendant is charged today.

13 Dkt. 70 (Response to Motion to Suppress), p. 2-3.

14 On January 20, 2020, during a motion to compel hearing, the government
15 referenced the homicide and argued to the Court:

16 In terms of actual request, I think we're here to talk about the first request
17 that the defense made in the motion to compel, and that relates to the
18 entire murder file --- from the underlying investigation into the murder of
19 Amarah Riley. We certainly oppose the request for unfettered access to
20 the communications of every investigator or attorney who has touched
21 this case over the course of the last one and a half years...

22 Well, we don't think it's necessary to review in camera. We oppose, for, I
23 think, obvious law-enforcement-sensitive reasons, sharing it with the
24 defense, but as a practical matter, it's not even -- these aren't emails that
25 are in our possession currently, as I'm sure you're aware. Going out and
26 collecting -- attempting to fashion search terms that would allow us to
capture all of the communications from anybody who's had any
involvement with the investigation into the death of Amarah Riley, which
began in September of 2018. The search warrants in this case that are the
subject of the Franks motion were filed -- were signed and executed in
early December 2018. So this investigation into the murder has been
going on for a full year-plus since that time.

27 Dkt. 104, p. 9-10 (Motion to Compel Hearing). The Court provided the parties
28 "seven (7) calendar days to file with the court a Notice of Intent to Request
29 Redaction of this transcript" but the government did not file a notice. *Id.*

1 On February 12, 2021, the government stated in response to a motion to
2 suppress, “At the same time as these two ongoing drug investigations, King County
3 Sheriff Detectives Kathleen Decker and John Free were investigating a homicide that
4 had occurred on September 19, 2018. As discussed at more length elsewhere, e.g., Dkt.
5 73, shell casings were collected at the scene, and one was imaged and uploaded into
6 the NIBIN system. Later, the detectives were notified that NIBIN linked the gun used
7 in the homicide both to a shots-fired incident in Seattle a few months prior and to a
8 firearm that SPD had seized from the defendant in April 2017 and then returned to him
9 in July 2017.” Dkt. 208 (Response to Motion to Suppress), p. 3.

10 The Court held public hearings on two motions that referenced both public and
11 protected information. Dkts. 295, 296, 315, 316. The parties agreed to using coded
12 names to protect information relating to the open investigation. Dkt. 303. The hearings
13 were open to the public and, in fact, the public attended both hearings, in the
14 courtroom and via telephone. Without venturing into the details of the testimony and
15 the evidence, the Court heard extensive testimony and reviewed evidence with respect
16 to the terms the government wants to redact.

17 After the hearings and upon request that the transcripts be prepared, the Court
18 ordered that the “[p]arties have seven (7) calendar days to file with the court a Notice
19 of Intent to Request Redaction of this transcript.” The government did not seek to
20 redact or strike any terms from the record. Dkt. 327, p. 6.

21 Virtually all the terms that the government seeks to redact have been part of the
22 government’s own record. The public, Mr. Wondie’s family, his community, law
23 students, and members of the bar have a right to know the truth in its entirety. That
24 truth is captured in the Court’s orders, while maintaining the secrecy of the
25 information and facts that are protected by the Court’s previous protective orders in
26 this case. Either everything or nearly everything the government seeks redacted is part
of the public records, which means that no legitimate interests are served by the
redaction.

//

1 DATED this 17th day of September, 2021.

2 Respectfully submitted,

3 *s/ Mohammad Ali Hamoudi*

4 *s/ Sara Brin*

5 Assistant Federal Public Defenders

6 Attorneys for Gizachew Wondie